

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON B. WOOD,

Defendant-Appellant.

UNPUBLISHED

May 29, 2001

No. 221266

Oakland Circuit Court

LC No. 98-161631-FC

Before: K.F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to three concurrent terms of fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first claims that his conviction should be reversed because the trial court erred in admitting evidence of other sexual acts that he had committed against the complainant. We disagree.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999). An abuse of discretion exists when the result is "so violative of fact and logic that it evidences a perversity of will, a defiance of judgment or an exercise of passion or bias." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). This Court will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights. MRE 103(a).

The admissibility of evidence of a defendant's other crimes, wrongs, or acts is governed by MRE 404(b). Such evidence is admissible under MRE 404(b) if it is: (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime; (2) relevant to an issue or fact of consequence at trial; (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403; and (4) the trial court, upon request, can give a limiting instruction to the jury. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The trial court did not abuse its discretion in admitting the challenged evidence under MRE 404(b). The evidence assisted the jury in weighing the witnesses' credibility, particularly when defendant suggested that the complainant was not developmentally disabled and could have rejected his advances. It was also probative of defendant's common scheme, plan, or system for taking advantage of the complainant. Defendant claims that the evidence is inadmissible due to its prejudicial nature. While the acts described are serious and incriminating, such characteristics are inherent in the underlying crime for which defendant was accused. The danger that MRE 404(b)(1) seeks to avoid is that of *unfair* prejudice, not prejudice that stems from the offensive nature of the crime itself. See *Starr, supra* at 499. Moreover, the trial court gave a proper limiting instruction to the jury concerning the use of the other acts evidence.

We also reject defendant's claim that reversal is required because the trial court failed to expressly weigh the prejudicial nature of the evidence, pursuant to MRE 403. There is no requirement that a court must specifically articulate on the record its complete reasoning in this regard, and defendant has failed to provide any authority to support such a claim. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Next, defendant claims that the trial court erred in admitting his confession because it was involuntary, under the totality of the circumstances, and elicited in violation of his right to counsel. Although defendant moved to suppress his confession and requested a *Walker*¹ hearing in the trial court, he did not timely do so on the grounds now asserted in this appeal. *People v Ray*, 431 Mich 260, 269; 430 NW2d 626 (1988); *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). Accordingly, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

We reject defendant's claim that his confession was elicited in violation of his right to counsel because he had previously retained counsel in another case. The Sixth Amendment right to counsel is offense specific, and cannot be invoked for all future prosecutions. *People v Smielewski*, 214 Mich App 55, 60; 542 NW2d 293 (1995). Further, "[t]he Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is until the initiation of adversary criminal proceedings by a formal charge, a preliminary hearing, an indictment, an information or an arraignment." *People v Riggs*, 223 Mich App 662, 676; 568 NW2d 101 (1997).

Here, the police did not violate defendant's Sixth Amendment right to counsel because his right had not yet attached in this case. Defendant's offenses in the other case, and those in the instant case, were distinct and were not "merged together." Although the parties were the same, the charges were brought in two different counties. Moreover, the offenses occurred over a year apart. As such, the fact that defendant invoked his right to counsel in connection with the other case is of no consequence to the investigation in the instant case. Defendant, therefore, had no Sixth Amendment right to counsel in this case at the time of the interview.

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

We acknowledge that a defendant's invocation of his Sixth Amendment right to counsel during judicial proceedings is distinct from the invocation of his Fifth Amendment right to counsel during custodial interrogation. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *Smielewski, supra*. However, the Fifth Amendment right to counsel is not implicated when a defendant requests an attorney at arraignment, and a defendant may waive that right by voluntarily waiving his *Miranda* rights after arraignment. *Smielewski, supra* at 61. Here, defendant voluntarily waived his *Miranda* rights in connection with the questioning in this case, and that waiver was not invalidated by his prior invocation of the Sixth Amendment right to counsel in another case. See *People v Crusoe*, 433 Mich 666, 696; 449 NW2d 641 (1989).

We also reject defendant's claim that his confession was involuntary under the totality of the circumstances. Statements of an accused made during custodial interrogation are inadmissible unless the accused has voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda, supra* at 444. The prosecutor must establish a valid waiver by a preponderance of the evidence. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). Whether a statement is voluntary is determined by examining police conduct. The determination of whether the statement was made knowingly and intelligently depends, in part, upon the defendant's capacity. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). In determining whether a statement was admissible, we consider the totality of the circumstances that surrounded the making of the statement, to determine whether it was freely and voluntarily made in light of the factors set forth by our Supreme Court in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is conclusive. *Id.*

The record does not support defendant's claim that his statements to police were involuntary. Defendant was seventeen years old at the time of the interview. See MCL 764.27; MSA 28.886. In fact, defendant was advised of his *Miranda* rights, which he waived, and indicated that he understood those rights. The trial court found that defendant's claims involving police coercion or inducement were not credible. The two interviews were conducted in separate sessions, and were brief. There was no evidence that the police used or threatened physical force or that they deprived defendant of sleep, food, or drink. Although defendant had taken thyroid medication on the prior morning, there was no evidence that the medication affected his capacity. The fact that, at the time of the interview, defendant was awaiting results from a forensic evaluation is of no consequence because the results showed that he was competent to stand trial. Finally, defendant had prior experience with police contact because, at the time of the interview in this case, he had already been arrested and charged in connection with another case.

We further reject defendant's claim that he is entitled to resentencing. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's fifteen-year minimum sentences are within the sentencing guidelines recommended range and, thus, are presumptively proportionate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Defendant has failed to demonstrate any unusual circumstances to overcome the presumption of proportionality. *People v Piotrowski*, 211 Mich App 527, 533; 536 NW2d 293 (1995).

We decline to review defendant's challenge to the scoring of offense variable ("OV") twelve. Defendant failed to object to the scoring of OV 12 before or at sentencing, and failed to establish that the challenge was brought as soon as the alleged inaccuracy could reasonably have been discovered. MCR 6.429(C). Accordingly, this claim is not preserved for appellate review.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper